A little less “protection elsewhere”, a little more protection solution

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Professor Vedsted-Hansen, your keynote for the 10th Fall Conference of the Network Migration Law “Dynamics in migration societies” is titled “Version 3.0 of the Common European Asylum System – Next Stop towards Protection Solutions or Stop for Asylum Seekers?”. Therefore, I would like to talk to you about certain elements of the ongoing reform process. *It seems, the overall notion of the Commission in reforming the Common European Asylum System (CEAS) is to take huge steps towards a further harmonization of the relevant rules. How can such harmonization have protective benefits for the asylum seekers?*

I think the idea of having a stronger harmonization of these rules can benefit asylum seekers in two ways: Depending on the outcome of the negotiation process the EU legal rules should, first and foremost, be clearer and, secondly, provide for fewer exceptions on the optional rules. This will in principle benefit asylum seekers because they will then not be dependent on the particular Member State in which they are bound to have their application examined and eventually granted protection. This element of arbitrariness, which I think is inherent in the Dublin-system, would be reduced by a stronger harmonization.

Especially the optional clauses often allow Member States to go to a lower level of protection. That was extremely clear in the first Asylum Procedures Directive that contained around 40 exceptions or derogations permissible for the Member States. And we still have such optional clauses in the Qualification Directive. Actually, one crucial provision is apparently even going to be maintained in the Qualification Regulation: It will still be permissible for Member States to reduce the level of social assistance for beneficiaries of subsidiary protection, which is a good example of a weak harmonization which is eventually to the detriment of asylum seekers and may even contribute to the unwanted phenomenon of secondary movements.

It is quite interesting, that it may well be that this optional clause on lower protection standards on these crucial issues for subsidiary protection holders has not been used as avidly by Member States to this point. But even so I would consider it a future problem, because in a number of Member States the whole exercise of the past year has been to reduce protection standards to the legally possible minimum and beyond, simply to reduce one's own attractiveness as an asylum country. Due to these tendencies I am fairly certain that such optional clauses will be made use of more widely in the future – maybe even more than legally sustainable – in order to simply foster a deterrent effect on asylum seekers not to arrive.

So harmonization in general seems to be a step in the right direction, but does that step go far enough? The Commission has long considered joint processing of asylum applications and even launched a "Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU", that you yourself contributed to. However, it eventually has not included it in its recent proposals. You on the other hand have spoken out in favor of such kind of administrative approach. In what sense could this solution be superior to the proposed harmonization of the provisions of the CEAS in your view?

I would not say that joint processing would in itself be superior to harmonization of the substantive or core procedural provisions of the CEAS instruments at such. But I think, when it comes to examination of asylum applications a mechanism for joint processing of the applications would contribute to enhancing the level of de facto-harmonization, because there would be less scope for national variations leading to disparities in recognition rates. Of course, this is connected and basically framed by the substance of the definition criteria of the prospective Application Regulation. The very fact that it is probably going to be a regulation will most likely lead to some reduction of these disparities because there will then be no scope for differing transposition into domestic law.

But even with a strong shift from directives to regulations which would have to be interpreted and applied alike in all Member States, differences in implementation beyond what can be explained by the different compositions of populations of asylum seekers would very likely persist. A joint processing mechanism could then be a way of doing away with this. But of course, it is a fairly radical step towards true communitarisation by taking away the competence to decide on asylum applications from the Member States which can be seen as a dramatic intrusion into their sovereign competences.

On the other hand, there is also another way of seeing advantage in joint processing: it could also be a device in assisting overburdened Member States. And in that regard I think we already have ways of joining efforts by having the European Asylum Support Office (EASO) – perhaps soon to be the European Agency on Asylum (EAA). We have them entering the domestic procedures with various kinds of expertise simply trying to extend resources or build capacities in overburdened Member States. This kind of a more technical or practical cooperation or assistance, however, in reality leaves us with a problem of transparency: What is happening on-site? Who is deciding what on which legal basis? Formalizing this joint exercise in

order to clarify competences and procedures would then provide us with a legal and – probably also – a political advantage in terms of transparency and accountability.

So, in a nutshell, what would the key elements of such joint processing need to be?

Of course, there are many different ways of designing these key elements and many different ways of combining them also. The 2013 study you mentioned provides a more detailed overview of approaches.

There would need to be different building blocks, so to speak:

At first, there would be a need to determine the body in charge of such joint processing which would essentially need to be an EU agency. And in that regard it could be argued that the reformed EASO could already be a step towards such system.

Secondly, we would need to clarify its competences. There could be different degrees of conferring sovereign competences on such an agency. It could be just interviewing asylum seekers and preparing decisions on the applications for protection, but it could also be taking the final decisions on the outcome of the cases. Of course many Member States would likely prefer to retain the competence to take those decisions ultimately. On the other hand, it would be irrational, counterproductive and in some instances even against the procedural interests of asylum seekers as well as Member States to separate the interviewing and the preparation of the decision from the decision itself. My experience from Appeals Board cases shows me, that you often realize the need to ask an additional question in the very moment before a final decision.

As a third important element, we would need to determine whether the decisions by such an agency should be recognized by all Member States and whether it should be combined with allocation of the persons upon recognition of their protection need and grant of protection status. If so, we would need to determine the criteria of such allocation and equally face the follow-up questions, e.g. a combination or separation of recognition and the issuance of a residence permit.

Another quite separate issue is of course what should be the appeals structure of such a body. Art. 257 TFEU provides for the possibility to establish specialized courts linked to the CJEU, so it would be legally feasible to have an appeals structure on the Union level. The alternative would likely be national appeals bodies in the Member States that would probably neutralize some of the advantages of the joint processing in the last instance.

In the end both approaches are equally pointing towards the direction of a more integrated, more unified European Union. However, after the Commission had presented the first package of proposals on May 4, 2016 Steve Peers declared it to be the "Orbanisation of EU asylum law" – is the EU indeed caving in at a time that humanitarian values should be upheld? If so, could it not be preferable to deepen the approach of a "multi-speed Europe"as

regards legal standards – uniting the Member States willing to uphold a high harmonized standard?

It seems clear that the packages, maybe in particular that from May 4, 2016, have these "plan b"-elements, as Steve Peers describes it. And in that sense they are – in line with the second package from July 13, 2016 – emphasizing the restrictive elements of harmonization. The question is whether they will be restrictive enough for certain Member States, which will be an extremely interesting aspect during the negotiations. It might be that one could eventually think of a more radical alternative to the attempt to harmonize.

If you think of a "multi speed"-Europe, we already have that to some extent in the field of asylum law, not least due to my own country (Denmark). It might well be that an even more differentiated or fragmented harmonization could be the outcome of this whole process. And that, I think, goes along with something that is beyond legal issues in the narrow sense. I think it may ultimately become a question to be addressed to some of the reluctant Member States, whether they sincerely want to be full members of the Union. Instead of accepting that these Member States should ultimately decide the direction of the EU towards dissolution, this needs to be raised as an open question. There might be a certain stage where it has to be realized that this group of Member States will not agree on something reasonably harmonized. And then we would have to discuss alternatives, e.g. the possibility of opting-out while maintaining a core of more fully harmonized Member States.

But there again, the interconnectedness between the CEAS and the Schengen area would play a significant role. If states do not have a reasonably harmonized asylum law standard their participation in the Dublin system and the Schengen area, e.g. because of uncontrollable secondary movements, will be questionable.

In your keynote you expressed severe concerns regarding the Commission's strong focus on restrictive elements. You especially pointed to a reinforcement of a "safe third country" policy that is now dominating the first and second package of the reform proposals for the CEAS. In reference to the title of your speech, are these signs of a next stop towards protection solutions or towards a stop for asylum seekers?

One has to realize that these elements of stopping for asylum seekers are nothing new. We have had the "external dimension", the "non-arrival" policies for quite a long time now. We have also had "safe third country" or "protection elsewhere" rules and practices concerning those who manage to get to our borders. But these elements are now apparently going to be reinforced. We have seen reinforced interception measures, cooperation with third countries even far down south in Africa, which is essentially an attempt to already prevent the arrival of asylum seekers. From a protection perspective the ultimate question is whether it would be possible to combine that with genuine protection solutions.

Now if we look at the content of the reform packages, I think even though they may be presented and perceived as the third stage towards a protection solution, it is hard not to see them as part of a more restrictive tendency, among other aspects

because of the “protection elsewhere”-approach, which is intensified in particular by the expanded definition and mandatory nature of “safe third country” rules. The merging of Dublin procedures with the “safe third country” rules adds to that impression, because in “Dublin IV” it has now been proposed that the inadmissibility of an application due to the “safe third country” rules should generally be decided before the Dublin criteria for responsibility are even being considered. This might arguably make the Dublin procedure very inefficient or time consuming. But it will also make this “protection elsewhere” perspective far more predominant in the whole examination procedure.

To conclude, in view of this predominance of a “non-arrival” as well as a “protection elsewhere” policy, are there any truly integrating elements that you see in the CEAS Version 3.0 and could they be eventually sufficient?

There are. The very fact that we will possibly receive regulations is pushing towards more harmonized standards. But an imbalance in this harmonization strategy will persist, because much of the substantive and procedural harmonization is, as I tried to illustrate last night, focusing on these restrictive elements: making “safe country” rules mandatory, expanding the “safe third country” notion, focusing much on abuse and on sanctions against secondary movements. In isolation these measures may be understandable and politically desirable for policy makers, but taken together the combined effect may be that the harmonization aims at elements of the examination procedure which Member States would be quite likely to restrict anyway. So that kind of harmonization efforts to some extent are superfluous.

And what may then be missing is to see the full and effective harmonization not only of the criteria, not only of the procedures, but also of the application and the actual way in which these procedures are being conducted. That is what may still be insufficiently harmonized and therefor result in very different proceedings and very different outcomes. These issues still have to be tackled in the upcoming negotiation process.

Professor Vedsted-Hansen, thank you very much for your time and your interesting input!
